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UNITED STATES DISTRICT COURT

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DISTRICT OF NEVADA

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MONTENEQUE N. KNOX,

Case No. 3:11-cv-00682-MMD-VPC

10

Petitioner,

ORDER

11

v.

12

E.K. McDANIELS, et al.,

Respondents.

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14 This action is a *pro se* petition for a writ of habeas corpus filed pursuant to 28
15 U.S.C. § 2254, by a Nevada state prisoner. This matter comes before the Court on the
16 merits of the amended petition.

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I. PROCEDURAL HISTORY

18

19 On January 19, 2007, the State charged petitioner in Reno Township Justice
20 Court by criminal complaint with possession of a stolen motor vehicle in violation of
21 NRS 205.273. (Exh. 2.¹) After the preliminary hearing, petitioner was bound over to the
22 Second Judicial District Court for the State of Nevada. (Exh. 4.) The information,
23 charging petitioner with possession of a stolen vehicle, was filed on February 13, 2007.
24 (Exh. 7.) The matter proceeded to a jury trial. (Exh. 23.) Petitioner was found guilty.
25 (Exh. 21.) At sentencing, petitioner was adjudicated a habitual criminal and sentenced
26 to serve a term of imprisonment of 10-25 years. (Exhs. 31 & 32.) The judgment of
conviction was filed on September 11, 2007. (Exh. 32.) Petitioner appealed his

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¹The Exhibits referenced in this order are found in the Court's record at dkt. nos. 8-12.

1 conviction. (Exh. 33.) On August 4, 2008, the Nevada Supreme Court affirmed
 2 petitioner's convictions. (Exh. 44.)

3 On March 31, 2009, petitioner filed a post-conviction habeas petition in the state
 4 district court. (Exh. 46.) The district court denied the petition. (Exh. 56.) Petitioner
 5 appealed the denial of his post-conviction habeas petition. (Exh. 63.) On July 14, 2011,
 6 the Nevada Supreme Court affirmed the denial of the post-conviction habeas petition.
 7 (Exh. 76.) Remittitur issued on August 8, 2011. (Exh. 77.)

8 On October 7, 2011, petitioner filed his federal habeas petition in this Court.
 9 (Dkt. no. 3.) On November 4, 2011, petitioner filed an amended petition. (Dkt. no. 6.)
 10 Respondents filed an answer to the amended petition on November 30, 2011. (Dkt. no.
 11 7.) Petitioner filed a reply to the answer on January 12, 2012. (Dkt. no. 15.)

12 Petitioner moved for leave to file a second amended petition. By order filed May
 13 31, 2013, the Court granted petitioner's motion. (Dkt. no. 24.) The Court's order allowed
 14 petitioner to file a second amended petition within thirty (30) days. (*Id.*) The order further
 15 specified that, if petitioner failed to file a second amended petition, this case was to
 16 proceed on the amended petition. (*Id.*) On July 1, 2013, petitioner filed a notice
 17 informing the Court that he would not be filing an amended petition. (Dkt. no. 25.) As
 18 such, this action proceeds on the amended petition at dkt. no. 6.

19 II. FEDERAL HABEAS CORPUS STANDARDS

20 The Antiterrorism and Effective Death Penalty Act ("AEDPA"), at 28 U.S.C. §
 21 2254(d), provides the legal standard for the Court's consideration of this habeas
 22 petition:

23 An application for a writ of habeas corpus on behalf of a person in
 custody pursuant to the judgment of a State court shall not be granted
 24 with respect to any claim that was adjudicated on the merits in State
 court proceedings unless the adjudication of the claim –

25 (1) resulted in a decision that was contrary to, or involved an
 26 unreasonable application of, clearly established Federal law, as
 determined by the Supreme Court of the United States; or

27 (2) resulted in a decision that was based on an unreasonable
 28 determination of the facts in light of the evidence presented in the
 State court proceeding.

1 The AEDPA “modified a federal habeas court’s role in reviewing state prisoner
 2 applications in order to prevent federal habeas ‘ retrials’ and to ensure that state-court
 3 convictions are given effect to the extent possible under law.” *Bell v. Cone*, 535 U.S.
 4 685, 693-694 (2002). A state court decision is contrary to clearly established Supreme
 5 Court precedent, within the meaning of 28 U.S.C. § 2254, “if the state court applies a
 6 rule that contradicts the governing law set forth in [the Supreme Court’s] cases” or “if the
 7 state court confronts a set of facts that are materially indistinguishable from a decision
 8 of [the Supreme Court] and nevertheless arrives at a result different from [the Supreme
 9 Court’s] precedent.” *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003) (quoting *Williams v.*
 10 *Taylor*, 529 U.S. 362, 405-406 (2000) and citing *Bell v. Cone*, 535 U.S. 685, 694
 11 (2002)). The formidable standard set forth in section 2254(d) reflects the view that
 12 habeas corpus is “a guard against extreme malfunctions in the state criminal justice
 13 systems,’ not a substitute for ordinary error correction through appeal.” *Harrington v.*
 14 *Richter*, 562 U.S. ___, ___, 131 S.Ct. 770, 786 (2011) (quoting *Jackson v. Virginia*, 443
 15 U.S. 307, 332 n.5 (1979)).

16 A state court decision is an unreasonable application of clearly established
 17 Supreme Court precedent, within the meaning of 28 U.S.C. § 2254(d), “if the state court
 18 identifies the correct governing legal principle from [the Supreme Court’s] decisions but
 19 unreasonably applies that principle to the facts of the prisoner’s case.” *Lockyer v.*
 20 *Andrade*, 538 U.S. at 75 (quoting *Williams*, 529 U.S. at 413). The “unreasonable
 21 application” clause requires the state court decision to be more than merely incorrect or
 22 erroneous; the state court’s application of clearly established federal law must be
 23 objectively unreasonable. (*Id.* (quoting *Williams*, 529 U.S. at 409).) In determining
 24 whether a state court decision is contrary to, or an unreasonable application of federal
 25 law, this Court looks to the state courts’ last reasoned decision. See *Ylst v.*
 26 *Nunnemaker*, 501 U.S. 797, 803-04 (1991); *Shackleford v. Hubbard*, 234 F.3d 1072,
 27 1079 n.2 (9th Cir. 2000), cert. denied, 534 U.S. 944 (2001).

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1 In a federal habeas proceeding, “a determination of a factual issue made by a
 2 State court shall be presumed to be correct,” and the petitioner “shall have the burden
 3 of rebutting the presumption of correctness by clear and convincing evidence.” 28
 4 U.S.C. § 2254(e)(1). If a claim has been adjudicated on the merits by a state court, a
 5 federal habeas petitioner must overcome the burden established in § 2254(d) and (e) on
 6 the record that was before the state court. *Cullen v. Pinholster*, 131 S.Ct. 1388, 1400
 7 (2011).

8 **III. DISCUSSION**

9 **A. Ground 1**

10 Petitioner claims that his due process rights were violated when the trial court
 11 refused to instruct the jury regarding his theory of defense. Petitioner raised this claim
 12 on direct appeal and the Nevada Supreme Court rejected the claim, as follows:

13 Knox contends that the district court erred by denying his proposed
 14 instruction, which would have required the jury to find that he intended to
 15 permanently deprive the owner of the vehicle before it could find him guilty
 16 of possession of a stolen vehicle. Knox claims that his theory of defense
 17 was that he was innocent of possession of a stolen vehicle and guilty of
 18 unlawful taking of a motor vehicle. Knox argues that the difference
 between these two crimes is that possession of a stolen vehicle requires
 the intent to permanently deprive the owner of the vehicle whereas
 unlawful taking of a motor vehicle does not. Knox further asserts that
 sufficient evidence was presented at trial to warrant his proposed unlawful
 taking of a motor vehicle instruction.

19 As a general rule, a defendant in a criminal case is entitled, upon request,
 20 to a jury instruction on his theory of the case so long as there is some
 21 evidence, no matter how weak or incredible, to support it. However, a
 defendant is not entitled to instructions that are misleading, inaccurate, or
 duplicitous, nor is he entitled to instructions on lesser-related offenses.

22 Here, Knox’s proposed instruction on the elements of possession of a
 23 stolen motor vehicle was inaccurate because the statute governing the
 24 elements of possession of a stolen motor vehicle does not require the
 25 state to prove that a defendant intended to deprive the owner permanently
 26 of his vehicle. And Knox’s proposed instruction on the elements of
 27 unlawful taking of a motor vehicle concerned an uncharged, lesser-related
 offense. Under these circumstances, the district court did not abuse its
 discretion in denying Knox’s proposed jury instructions.

28 (Exh. 44, at pp. 2-3 (footnotes and internal quotations omitted).) The factual findings of
 the state court are presumed correct. 28 U.S.C. § 2254(e)(1).

1 To obtain federal habeas relief based on an improper jury instruction, petitioner
2 must establish that the instruction so infected the entire trial that the resulting conviction
3 violates due process. *Masoner v. Thurman*, 996 F.2d 1003, 1006 (9th Cir. 1993); *Estelle*
4 *v. McGuire*, 502 U.S. 62, 72 (1991); *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977). In
5 reviewing jury instructions, the court inquires as to whether the instructions as a whole
6 were misleading or inadequate to guide the jury's deliberation. *U.S. v. Garcia-Rivera*,
7 353 F.3d 788, 791 (9th Cir. 2003) (*citing United States v. Frega*, 179 F.3d 793, 806 n.16
8 (9th Cir. 1999) (internal citations omitted)). An instruction may not be judged in isolation,
9 "but must be considered in the context of the instructions as a whole and the trial
10 record." *Id.* Furthermore, jurors are presumed to follow the instructions that they are
11 given. *U.S. v. Olano*, 507 U.S. 725, 740 (1993). Even if an instructional error is found, it
12 is subject to harmless error review. *Calderon v. Coleman*, 525 US. 141 (1998) (*citing*
13 *Brecht v. Abrahamson*, 507 U.S. 619 (1993)). The question on federal habeas review is
14 whether the instructional error had a "substantial and injurious effect or influence in
15 determining the jury's verdict." *Id.*

16 In the instant case, petitioner requested an instruction on the unlawful taking of a
17 motor vehicle, which is a lesser-related offense to possession of a stolen motor vehicle.
18 See NRS 205.2715 et seq. The instruction proposed by petitioner was an incorrect
19 statement of Nevada law. The Nevada Supreme Court had held almost 30 years prior to
20 petitioner's trial that NRS 205.273 "does not require the state to prove that [a defendant]
21 intended to deprive the owner permanently of his vehicle." *Montes v. State*, 603 P.2d
22 1069, 1071 (Nev. 1979). The trial court properly rejected the proposed instruction and
23 the Nevada Supreme Court's decision was correct. The trial court's refusal to give the
24 proposed instruction on the unlawful taking of a motor vehicle was not erroneous and
25 did not have a substantial and injurious effect on the outcome of the jury's verdict.
26 Petitioner has failed to meet his burden of proving that the Nevada Supreme Court's
27 ruling was contrary to, or involved an unreasonable application of, clearly established
28 federal law, as determined by the United States Supreme Court, or that the ruling was

1 based on an unreasonable determination of the facts in light of the evidence presented
2 in the state court proceeding. Federal habeas relief is denied as to Ground 1 of the
3 amended petition.

4 **B. Ground 2**

5 Petitioner claims that his Sixth Amendment right to the effective assistance of
6 counsel was violated because his trial counsel: (1) went to trial after only 20 days of
7 preparation; (2) failed to hire an investigator; (3) ignored his requests for pretrial
8 motions, including a motion for a continuance; (4) failed to appear at sentencing and
9 sent another attorney to handle it; (5) failed to submit a psychological evaluation as
10 mitigating evidence; and (6) stipulated to the admission of exhibits at trial.

11 Ineffective assistance of counsel claims are governed by the two-part test
12 announced in *Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland*, the
13 Supreme Court held that a petitioner claiming ineffective assistance of counsel has the
14 burden of demonstrating that (1) counsel's performance was unreasonably deficient,
15 and (2) that the deficient performance prejudiced the defense. *Williams v. Taylor*, 529
16 U.S. 362, 390-391 (2000) (*citing Strickland*, 466 U.S. at 687). To establish
17 ineffectiveness, the defendant must show that counsel's representation fell below an
18 objective standard of reasonableness. *Id.* To establish prejudice, the defendant must
19 show that there is a reasonable probability that, but for counsel's unprofessional errors,
20 the result of the proceeding would have been different. *Id.* A reasonable probability is
21 "probability sufficient to undermine confidence in the outcome." *Id.* Additionally, any
22 review of the attorney's performance must be "highly deferential" and must adopt
23 counsel's perspective at the time of the challenged conduct, in order to avoid the
24 distorting effects of hindsight. *Strickland*, 466 U.S. at 689. It is the petitioner's burden to
25 overcome the presumption that counsel's actions might be considered sound trial
26 strategy. *Id.*

27 Ineffective assistance of counsel under *Strickland* requires a showing of deficient
28 performance of counsel resulting in prejudice, "with performance being measured

1 against an ‘objective standard of reasonableness,’ . . . ‘under prevailing professional
 2 norms.’” *Rompilla v. Beard*, 545 U.S. 374, 380 (2005) (quotations omitted). If the state
 3 court has already rejected an ineffective assistance claim, a federal habeas court may
 4 only grant relief if that decision was contrary to, or an unreasonable application of, the
 5 *Strickland* standard. See *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003). There is a strong
 6 presumption that counsel’s conduct falls within the wide range of reasonable
 7 professional assistance. *Id.*

8 The United States Supreme Court has described federal review of a state
 9 supreme court’s decision on a claim of ineffective assistance of counsel as “doubly
 10 deferential.” *Cullen v. Pinholster*, 131 S.Ct. 1388, 1403 (2011) (*quoting Knowles v.*
 11 *Mirzayance*, 556 U.S. 111, 112-113, 129 S.Ct. 1411, 1413 (2009)). In *Cullen v.*
 12 *Pinholster*, the Supreme Court emphasized that: “We take a ‘highly deferential’ look at
 13 counsel’s performance . . . through the ‘deferential lens of § 2254(d).’” *Id.* at 1403
 14 (internal citations omitted). Moreover, federal habeas review of an ineffective assistance
 15 of counsel claim is limited to the record before the state court that adjudicated the claim
 16 on the merits. *Cullen v. Pinholster*, 131 S.Ct. at 1398-1401. The United States Supreme
 17 Court has specifically reaffirmed the extensive deference owed to a state court’s
 18 decision regarding claims of ineffective assistance of counsel:

19 Establishing that a state court’s application of *Strickland* was
 20 unreasonable under § 2254(d) is all the more difficult. The standards
 21 created by *Strickland* and § 2254(d) are both “highly deferential,” *id.* at
 22 689, 104 S.Ct. 2052; *Lindh v. Murphy*, 521 U.S. 320, 333, n.7, 117 S.Ct.
 23 2059, 138 L.Ed.2d 481 (1997), and when the two apply in tandem, review
 24 is “doubly” so, *Knowles*, 556 U.S. at ___, 129 S.Ct. at 1420. The
 25 *Strickland* standard is a general one, so the range of reasonable
 applications is substantial. 556 U.S. at ___, 129 S.Ct. at 1420. Federal
 habeas courts must guard against the danger of equating
 unreasonableness under *Strickland* with unreasonableness under §
 2254(d). When § 2254(d) applies, the question is whether there is any
 reasonable argument that counsel satisfied *Strickland*’s deferential
 standard.

26 *Harrington v. Richter*, ___ U.S. ___, 131 S.Ct. 770, 788 (2011). “A court considering a
 27 claim of ineffective assistance of counsel must apply a ‘strong presumption’ that
 28 counsel’s representation was within the ‘wide range’ of reasonable professional

1 assistance." *Id.* at 787 (quoting *Strickland*, 466 U.S. at 689). "The question is whether
 2 an attorney's representation amounted to incompetence under prevailing professional
 3 norms, not whether it deviated from best practices or most common custom." *Id.*
 4 (internal quotations and citations omitted).

5 During his post-conviction appeal in state court, petitioner raised only three
 6 claims of ineffective assistance of counsel, claiming that his counsel was ineffective for
 7 failing to: (1) investigate, evaluate, and assert that he was mentally incompetent to
 8 stand trial and be sentenced, (2) assert an insanity defense at trial, and (3) further
 9 evaluate his mental competence and present mitigation evidence about his mental
 10 incompetency at sentencing. (Exh. 72, at pp. 9-14.) To the extent that petitioner raises
 11 additional claims in his federal petition, those claims are unexhausted and are
 12 dismissed. 28 U.S.C. § 2254(b); *Koerner v. Grigas*, 328 F.3d 1039, 1046 (9th Cir. 2002)
 13 (stating that to satisfy exhaustion, each of petitioner's claims must have been previously
 14 presented to the Nevada Supreme Court with references to a specific federal
 15 constitutional guarantee, as well as a statement of facts that entitled petitioner to relief).

16 As for the claims that have been exhausted, the Nevada Supreme Court rejected
 17 them, as follows:

18 Knox contends that the district court abused its discretion by denying his
 19 habeas petition without conducting an evidentiary hearing. Knox claims
 20 that trial counsel was ineffective for failing to (1) investigate and assert
 21 that he was not competent for trial or sentencing, (2) present an insanity
 22 defense, and (3) present mitigating evidence regarding his incompetency
 23 at the sentencing hearing. We disagree.

24 When reviewing the district court's resolution of an ineffective-assistance
 25 claim, we give deference to the court's factual findings if supported by
 26 substantial evidence and not clearly erroneous but review the court's
 27 application of the law to those facts de novo. *Lader v. Warden*, 121 Nev.
 28 682, 686, 120 P.3d 1164, 1166 (2005). Here, the district court found that
 Knox could not demonstrate that he was prejudiced by counsel's allegedly
 deficient performance. See *Strickland v. Washington*, 466 U.S. 688, 694
 (1984). Further, our review of the record reveals that Knox was not entitled
 to an evidentiary hearing because his claims were either repelled by the
 record or not pleaded with the requisite factual specificity. See *Mann v.*
State, 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002); *Hargrove v. State*,
 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). Therefore, we conclude
 that the district court did not err by rejecting Knox's ineffective-assistance
 claims.

1 (Exh. 76, at pp. 1-2.) The factual findings of the state court are presumed correct. 28
 2 U.S.C. § 2254(e)(1). Conclusory allegations will not overcome the presumption that the
 3 state court's findings are correct. *Bragg v. Galaza*, 242 F.3d 1082, 1087 (9th Cir. 2000).
 4 The Nevada Supreme Court applied the correct *Strickland* standard and concluded that
 5 petitioner could not show prejudice from any of counsel's alleged deficiencies.
 6 Petitioner did not present to the Nevada Supreme Court, and has not presented to this
 7 Court, any evidence that he was incompetent to stand trial or to be sentenced. Nor has
 8 he presented any evidence demonstrating that an insanity defense to the charge of
 9 possession of a stolen motor vehicle would have had a reasonable likelihood of success
 10 at trial. As for counsel's alleged failure to submit the psychological evaluation of Dr. Bill
 11 Davis as mitigating evidence at sentencing, the sentencing court stated on the record
 12 that it had considered that report. (Exh. 31, at p. 34.) Petitioner has failed to
 13 demonstrate that his counsel's performance was deficient or that he was prejudiced
 14 under *Strickland*. Petitioner has failed to meet his burden of proving that the Nevada
 15 Supreme Court's ruling was contrary to, or involved an unreasonable application of,
 16 clearly established federal law, as determined by the United States Supreme Court, or
 17 that the ruling was based on an unreasonable determination of the facts in light of the
 18 evidence presented in the state court proceeding. This Court denies federal habeas
 19 relief as to Ground 2 of the amended petition.

20 **C. Ground 3**

21 Petitioner claims that his Sixth and Fourteenth Amendment rights to a jury trial
 22 were violated when the trial court adjudicated him a habitual criminal. Petitioner alleges
 23 that the habitual criminal adjudication runs afoul of *Cunningham v. California*, 649 U.S.
 24 270 (2007), because it is a sentence enhancement that must be submitted to a jury.
 25 Petitioner raised this claim on direct appeal and the Nevada Supreme Court rejected the
 26 claim, as follows:

27 Knox contends that the district court erred when it adjudicated him a
 28 habitual criminal. Quoting *O'Neill v. State*, 123 Nev. 9, 16, 153 P.3d 38,
 43, cert. denied, ___ U.S. ___, 128 S.Ct. 153 (2007), Knox claims that the

district court used facts such as "a defendant's criminal history, mitigation evidence, victim impact statements and the like in determining whether to dismiss [a habitual criminality] count." Knox argues that pursuant to Cunningham v. California, 549 U.S. 270 (2007), Blakely v. Washington, 542 U.S. 296 (2004), and Apprendi v. New Jersey, 530 U.S. 466 (2000), a jury should have established the existence of these facts beyond a reasonable doubt before they were considered by the district court.

In O'Neill, we observed that the plain language of NRS 207.010(2) grants the district court discretion to dismiss a count of habitual criminality, not the discretion to impose such an adjudication based on factors other than prior convictions. We noted that the district court may consider facts such as a defendant's criminal history, mitigation evidence, victim impact statements and the like in determining whether to dismiss a habitual criminality count because such facts do not operate to increase the punishment beyond the already established statutory maximum and therefore need not be found by a jury beyond a reasonable doubt. And we concluded that neither NRS 207.010 nor our case law interpreting it violates Cunningham, Blakely, or Apprendi.

Our review of the record on appeal reveals that the State filed a notice of intent to seek habitual criminal adjudication, the district court found that Knox had three valid prior felony convictions, and the district court chose not to dismiss the habitual criminal count. Under these circumstances, Knox has failed to demonstrate that the district court erred in adjudicating him a habitual criminal.

Exh. 44, at pp. 4-5 (footnotes and internal quotations omitted).

In *Almendarez-Torrez v. United States*, 523 U.S. 224 (1998), the United States Supreme Court held that a sentencing court may enhance a sentence on the basis of prior convictions even if the fact of those convictions was not found by a jury. *Apprendi* did not overrule *Almendarez-Torrez*. The Ninth Circuit has repeatedly held that *Almendarez-Torrez* remains binding law until explicitly overruled by the Supreme Court. See *United States v. Martinez-Rodriguez*, 472 F.3d 1087, 1092-93 (9th Cir. 2007); *United States v. Weiland*, 420 F.3d 1062, 1079 n.6 (9th Cir. 2005); *United States v. Reyes-Pacheco*, 248 F.3d 942, 944-45 (9th Cir. 2001); *United States v. Pacheco-Zepeda*, 234 F.3d 411, 413-14 (9th Cir. 2000). Moreover, petitioner's claim is specifically foreclosed by *Tilcock v. Budge*, 538 F.3d 1138, 1143-45 (9th Cir. 2008) ("[U]nder both the text of the Nevada Revised Statutes section 207.010 and Nevada precedent, the fact of prior convictions alone exposes a defendant to the statutory maximum under Nevada's habitual criminal statute. Consequently, section 207.010 does not violate

1 Apprendi, and the Nevada Supreme Court did not unreasonably apply Apprendi in
 2 rejecting petitioner's claim."). Likewise, in the instant case, petitioner has failed to meet
 3 his burden of proving that the Nevada Supreme Court's ruling was contrary to, or
 4 involved an unreasonable application of, clearly established federal law, as determined
 5 by the United States Supreme Court, or that the ruling was based on an unreasonable
 6 determination of the facts in light of the evidence presented in the state court
 7 proceeding. This Court denies federal habeas relief as to Ground 3 of the amended
 8 petition.

9 **D. Petitioner's Motion Immediate for Release**

10 On April 3, 2014, petitioner filed a "motion for immediate release." (Dkt. no. 27.)
 11 Respondents opposed the motion for immediate release. (Dkt. no. 28.) Petitioner
 12 replied. (Dkt. no. 29.) In his motion for immediate release, petitioner fails to present any
 13 legal authority authorizing an immediate release from custody. Given the Court's denial
 14 of petitioner's claims on the merits, as discussed herein, petitioner's motion for
 15 immediate release from custody is denied.

16 **IV. CERTIFICATE OF APPEALABILITY**

17 District courts are required to rule on the certificate of appealability in the order
 18 disposing of a proceeding adversely to the petitioner or movant, rather than waiting for a
 19 notice of appeal and request for certificate of appealability to be filed. Rule 11(a). In
 20 order to proceed with his appeal, petitioner must receive a certificate of appealability.
 21 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22; 9th Cir. R. 22-1; *Allen v. Ornoski*, 435 F.3d
 22 946, 950-951 (9th Cir. 2006); see also *United States v. Mikels*, 236 F.3d 550, 551-52
 23 (9th Cir. 2001). Generally, a petitioner must make "a substantial showing of the denial of
 24 a constitutional right" to warrant a certificate of appealability. *Id.*; 28 U.S.C. § 2253(c)(2);
 25 *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). "The petitioner must demonstrate that
 26 reasonable jurists would find the district court's assessment of the constitutional claims
 27 debatable or wrong." *Id.* (quoting *Slack*, 529 U.S. at 484). In order to meet this threshold
 28 inquiry, the petitioner has the burden of demonstrating that the issues are debatable

1 among jurists of reason; that a court could resolve the issues differently; or that the
2 questions are adequate to deserve encouragement to proceed further. *Id.* In this case,
3 no reasonable jurist would find this Court's denial of the petition debatable or wrong.
4 The Court therefore denies petitioner a certificate of appealability.

5 **V. CONCLUSION**

6 It is therefore ordered that petitioner's motion for immediate release (dkt. no. 27)
7 is denied.

8 It is further ordered that the amended petition for a writ of habeas corpus (dkt. no.
9 6) is denied in its entirety.

10 It is further ordered that petitioner is denied a certificate of appealability.

11 It is further ordered that the Clerk of Court shall enter judgment accordingly.

12 DATED THIS 30th day of June 2014.

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MIRANDA M. DU
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UNITED STATES DISTRICT JUDGE